IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS

OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 52/2002

Bahadur Ram … Appellants.

Vs.

State .. Respondent.

Decided on 05-09-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S. Verma, J.)

Dated: 05-09-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 52 of 2002

Bahadur Ram S/o Bachi Ram,
R/o Bhital Gaon, P.S. Kotwali Bageshwar,
District Bageshwar, at present New Light
Tailors, Kanda Parao, District Bageshwar …. Appellant.

Vs.

State .. Respondent.

Sri M.C. Pande, learned counsel for the appellant.
Sri H.C. Pande, learned A.G.A. for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.
Dated: 05-09-2005

(Per: Hon'ble Irshad Hussain, J.)

Accused Bahadur Ram stood trials for an offences punishable under Section 302 I.P.C. in sessions trial No. 41/2000; under Section 4/25 Arms Act in sessions trial No.42/2000 and under Section 25 of the Arms Act in sessions trial No. 43/2000. All these sessions trials consolidated and were decided per judgment dated 12-12-2001 by the then Sessions Judge, Bageshwar and the accused was held guilty under all these three counts. He was sentenced to undergo imprisonment for life and fine of Rs. 5000/- under Section 302 I.P.C.; R.I. for six months under Section 4/25 Arms Act and R.I. for three years under Section 25 of the Arms Act. The sentences were directed to run concurrently.

2- According to the F.I.R. lodged at P.S. Kotwali, Bageshwar at 13.10 P.M. on 29-8-1999, by H.C. Ram Kumar Sharma (P.W.5) the then incharge Police Out Post Kanda, accused Bahadur Ram was reported to have committed the murder of his wife Smt. Tulasi Devi at about 11 A.M. the same day in his own shop-cum-residential premises situate in 'Kanda Parao'. Information of this incident was given to this witness by Mahendra Singh who was running a restaurant across the road and in front of the shop of the accused. Mahendra Singh was stated to have received this

information from Ashok Kumar, aged about 15 years, a nephew of accused Bahadur Ram. On this information witness Ram Kumar Sharma immediately reached the place of the occurrence, tailoring shop of the accused which was run under the name and style ‘New Light Tailor, Kanda Parao’, along with said Mahendra Singh, constable Kehav Dutt (P.W.6) and Sunder Singh Gadiya (P.W.4). AT the place of the incident it was found that the front door of the shop of the accused was latched from inside and therefore the witnesses went towards the rear portion of the shop and its door was also found latched. A window of the rear portion was, however, found open and through the window H.C. Ram Kumar Sharma called upon the accused Bahadur Ram, who was inside, to open the door but accused was not cooperating. Witness then peeped inside from the window but accused Bahadur Ram pointed and aimed the barrel of the gun on the said witness and retorted that he will not open the door. The accused was, however, successfully coaxed by the witnesses to have the door of the shop opened. When the witnesses including H.C. Ram Kumar Sharma went inside the shop it was found that Smt. Tulasi Devi, the wife of the accused was lying dead with injuries on her person on the wooden floor of the shop and the accused was then having a gun and a khukri in his hands. Both these weapons were taken from the accused and were kept there in the shop under the supervision and guard of constable Isham Singh and witnesses and accused Bahadur Ram was taken in to custody. H.C. Ram Kumar Sharma then took the accused with him and left for Bageshwar along with constable Keshav Dutt (P.W.6) to report the matter at the police station. In the way accused Bahadur Ram started showing signs of nausea and vomited whereupon the accused was left at Government Hospital, Bageshwar for medical aid in the supervision of constable Keshav Dutt whereas witness H.C. Ram Kumar Sharma reached the Police Station, Kotwali and filed his written report, Ext. Ka.3 regarding this incident.

3- On the basis of the written report, check F.I.R. was drawn and case against the accused was registered under Section 302 I.P.C. Investigation of the case was entrusted to S.O. P.S., Kotwali

Inspector Shailendra Bhardwaj who reached the place of the incident and in his supervision got the inquest on the dead body held by A.S.I. Roop Ram Sagar (P.W.7). The dead body was then sent for post mortem examination which was performed at 1.10 P.M. on 30-8-1999 by Dr. V.K.Manwar. A single barrel gun and khukri were attached from the place of the occurrence. The ornaments form the dead body of the deceased were removed and given in the Supurdagi of Madho Ram (P.W.2), a brother of the deceased. Statements of the witnesses were also recorded by the Investigating Officer and on completion of the investigation, charge sheet, Ext. Ka.11 under Section 302 I.P.C. was submitted against the accused on 17-9-1999. Charge sheets were also submitted against the accused for offences punishable under Section 4/25 Arms Act as well as under Section 25 of the Arms Act for having possessed without license khukri, the weapon of the assault and a single barrel gun.

4- The accused did not admit the accusations of the prosecution and gave out that he has been falsely implicated in the case by the police after he was picked up from the taxi stand where he had gone to saw off the daughter of his elder brother. He gave out that he was in possession of the shop for the last about 15-20 years and there was move to evict him from it. According to him to attain the said object some one had committed the murder of his wife.

5- As is evident there was no direct evidence of the fatal assault on the person of Smt. Tulasi Devi deceased and the case of the prosecution rests solely on the circumstantial evidence. At the trial, the prosecution examined in all nine witnesses, whereas one witness was examined as a court witness to prove the post mortem report of the deceased. P.W.1, Sundar Singh son of Anand Singh was the witness of attachment of blood stained khukri and gun from the place of the incident and although he admitted his signatures on memo of attachment of sample of blood stained and plain pieces of wood of the floor of the rear portion of the premises, but claimed that these were not seized in his presence and that his signatures were obtained at the police station. He was

declared hostile. P.W.2, Madho Ram was the witness of inquest of the dead body of Smt. Tulasi and her ornaments were given in his custody vide memo, Ext. Ka.10. He however gave out that the ornaments were not taken from the person of the deceased in his presence and he was, therefore, declared hostile. He is one of the village brother of the deceased. P.W.3, Ashok Kumar, a 15 years old nephew of the deceased testified that his uncle accused Bahadur Ram and his aunt Smt. Tulasi Devi used to reside together in 'Kanda Parao'. He could not say as to how the death of his aunt Smt. Tulasi Devi deceased was caused. He was thus declared hostile. P.W.4, Sundar Singh son of Lal Singh is another witness of inquest on the dead body of the deceased. He gave out that the dead body was not sealed in his presence and he was therefore declared hostile by the prosecution. P.W.5, A.S.I. Ram Kumar Sharma was posted as H.C. incharge Police Out Post, Kanda on the relevant date. He is the witness of the fact. He lodged the F.I.R. and proved the prosecution case as narrated in it and reproduced above. He also identified gun, material exhibit-1 and khukri, material exhibit-2 which were in the hands of the accused when the shutters of he shop's rear portion was opened and he went inside to see the dead body of Smt. Tulasi Devi lying there on the floor with injuries and accused was there with these weapons and was then taken in to custody. P.W.6, constable Keshav Dutt is also another witness of the fact and he also supported the prosecution case as set up in the F.I.R. He had accompanied witness Ram Kumar Sharma and saw the accused in the shop with gun, exhibit-1 and khukri, exhibit-2 and where the dead body of the wife of the accused was found lying with injuries in the shop. He was also posted at Police Out Post, Kanda on that day. P.W.7, S.I. Roop Ram Sagar gave evidence to prove that various steps taken in the investigation by the Station Officer, Inspector Shailendra Bhardwaj and formally proved the site plan, Ext. Ka.4; memo of attachment of blood stained khukri, exhibit-1; memo of attachment of gun, exhibit-9; memo of attachment of samples of blood stained and plain of wood of the floor of the room, Ext. Ka.2 and the statements of the witnesses recorded

by the Investigating Officer. He also formally proved the charge sheet, Ext. Ka.11 submitted against the accused under Section 302 I.P.C. The piece of the wood of the floor were also connected as exhibit-3 and exhibit-4 by his evidence. P.W.8, A.S.I. Laxmi Prasad Upadhyaya was posted as Head Moharir, P.W. Kotwali on 29-8-1999 and check F.I.R. was prepared by him on the basis of the written report, Ext. Ka.3 and corresponding G.D. entry No. 25 of the same date and time, that is, 13.10 P.M. was also made by him. He also gave out that A.S.I. Ram Kumar Sharma had told him that the accused Bahadur Ram was left at the hospital for treatment. After registration of the case the relevant papers were sent to the Investigating Officer Inspector Shailendra Bhardwaj who had already left the police station in connection with official duty. On return to the police station the Investigating Officer deposited the case property including the khukri and gun in sealed packets at the police station and relevant G.D. entry No.44 of the same date and time 19-30 was made by him. He also testified that the Investigating Officer before returning to the police station also visited the hospital and the entry in that regard was made in G.D. at report No. 46 of 20-30 dated 29-8-1999. P.W.9, constable Bahadur Singh proved that the case property in sealed packets were entrusted to him on 9-10-1999 to be taken to government lab, Agra where the packets were delivered on 11-10-1999 as such and the seals were not tampered with during the period when the sealed packets remained in his custody.

6- Court witness Jagdish Chand Joshi (C.W.1) was posted As Pharmacist in C.H.C., Bageshwar on 30-10-1999 when the post mortem on the dead body of Smt. Tulasi was conducted in his presence by the Medical Officer, Dr. V.K. Manwar. He brought the original post mortem register and formally proved the post mortem report, Ext. Ka.12. Dr. Manwar was seriously sick and this was the reason that this witness was examined to prove this part of the evidence of the prosecution. During the appeal it was also reported by the learned A.G.A. that Dr. V.K. Manwar had died due to his ailment on 31-7-2004 and copy of the death certificate dated 19-8-2004 was also brought on record. As per the

post mortem report, Ext. Ka.12 the ante-mortem injuries detected were as below:-

1- Incised wound 4.2 cm x 1.2 cm x scalp deep, on the left side of temporal region.

2- (i) Incised wound, 3.2cm x 1.4cm x muscle deep,
(ii) Incised wound, 3.2 cm x 1.2 cm x muscle deep,
on the back of left side chest and the distance between these two incised wounds 2.4 cm.

3- (i) Incised wound, 4 cm x 2cm x bone deep,
(ii) Incised wound 4.2cm x 1.4cm x muscle deep,
On the back of right side of chest. The distance between the two injuries 2.8 cm.

4- Incised cut injury on left middle, little and ring fingers.

5- Multiple incised injuries five in number on the left Side of wrist joint (dorsal).

On Internal examination both the lungs were found congested. Left ventricle of the heart was empty and right was full of blood. There was about half cup of semi liquid fluid in the stomach. Small and large intestines were distended with gases. The death of the deceased was caused due to haemorrhagic shock as a result of excessive bleeding. Rigor-mortis was found present in the dead body.

7- No evidence was adduced in the defence by the accused.

8- Placing reliance on the evidence and considering the entire material on record the trial court found the accused guilty and convicted him as aforesaid. In coming to the said conclusion, the trial court noticing the fact that prosecution case was based on circumstantial evidence, came to the conclusion that the following circumstance were clearly established by the prosecution against the accused. They are :-

(1) The accused and his wife Smt. Tulasi Devi deceased were lying together in the accused’s shop-cum-residential premises in ‘Kanda Parao’ the place of the occurrence.

(2) On the day of the occurrence Smt. Tulasi Devi was seen alive with the accused in the premises before the occurrence.

(2) Accused alone was present in the said premises which was locked from inside and where the dead body of Smt. Tulasi Devi was lying on the floor with injuries.

(4) A blood stained khukri, material exhibit-2 was attached from the said premises and the incised injuries sustained by Smt. Tulasi Devi deceased were attributable to this weapon.

(5) Smt. Tulasi Devi sustained multiple incised injuries, which were possible only when she was kept confined in the shop unprotected and was assaulted by khukri wielding assailant present there in the said premises.

(6) The murder was committed in the rear portion of the said premises so that nobody can easily notice screaming sound of the victim.

(7) Accused gave false explanation that he was not there in the said premises at the time of the incident and was arrested from the bus station where he had gone to saw of his niece.

9- Sri M.C. Pande, learned counsel appearing on behalf of the accused pressed in to service his submissions to assail the propriety of the judgment under appeal. According to him the prosecution has miserable failed to prove the incriminating circumstances and also the chain thereof to bring home the guilt of the accused. Learned counsel contended that although there can be no doubt that the death of Smt. Tulasi Devi was homicidal but this could not be an incriminating circumstance against the accused unless the accused so connected with the homicidal death. He pointed out that there was absolutely no independent evidence regarding the presence of accused and his wife Smt. Tulasi Devi together near about the place of occurrence in their shop-cum-residential premises and it was an important factor that even Mahendra Singh, the owner of the restaurant situate in front of the said premises and who was said to have given the information of

the murder of the deceased by the accused was not examined by the prosecution in evidence and whereas the witness Ashok Kumar (P.W.3), a nephew of the accused, who was stated to have given the information to Mahendra Singh, was declared hostile by the prosecution as he has not supported the claim of the prosecution that the murder was committed by the accused. Learned counsel assailed the evidence of police witnesses Ram Kumar Sharma (P.W.5) and Keshav Dutt (P.W.6) suggesting that both of them were interested witnesses in the sense that they were material contradictions in the evidence of both these witnesses, which warranted an inference that both of them were not reliable witnesses. Learned counsel also came very heavily on the so called recovery of the blood stained khukri ,alleged weapon of the assault and also a gun from the accused and further pointed out that the prosecution had not been able to connect the recovered khukri to the offence and the accused. He pointed out that the investigation was defective and there was no credible evidence regarding the motive to commit the crime by the accused. Conviction under the provisions of the Indian Arms Act was assailed on the grounds that neither the notification prohibiting carrying or possession of khukri was produced before the Sessions Judge nor the legal sanction as envisaged under Section 39 of the Arms Act to prosecute the accused for possessing an unlicensed gun was proved by the prosecution and the accused therefore could not have been convicted for the offences punishable under Section 4/25 and Section 25 of the Arms Act.

10- As against this, learned A.G.A. supported the judgment of the trial court and urged that the prosecution had completed the chain of circumstance that established the offence against the accused beyond any reasonable doubt. Learned A.G.A. came out with the argument that the deceased was lastly alive in the company of the accused in the said premises and that none other than the accused could only have been able to commit the murder of the victim and therefore the incriminating circumstances

appearing against the accused were very vital and connect him with the offence with which he was charged. According to him the evidence of police witnesses could legally be placed on the same footing as the evidence of a public witness and the evidence of police witnesses on being found credible on careful scrutiny could legally be made basis of conviction of the culprit and that the trial court made no error in placing reliance on the evidence of P.W.5 and P.W.6 in coming to the conclusion that accused was arrested from the said premises where the dead body of his wife Smt. Tulasi Devi deceased was found lying with injuries and the weapon of assault, khukri was also attached from the place of the incident. Therefore, trial court was justified in convicting and sentencing the accused for the offence of murder committed by him.

11- On this backdrop, we have to see whether any offence can be said to have been established and proved against the accused so as to convict and sentence him per judgment under appeal.

12- There can be no doubt that Smt. Tulasi Devi died a homicidal death. The post mortem was conducted by Dr. V.K. Manwar and his post mortem examination report, Ext. Ka.12 was proved by the evidence of court witness Jagdish Chand Joshi (C.W.1) who was posted as a pharmacist with the medical officer in C.H.C., Bageshwar on 30-10-1999 when the post mortem examination on the dead body was conducted in his presence. It was proved by him that Dr. V.K. Manwar was seriously ill and it has come on record that he had also later on died due to his ailment. The secondary evidence was thus admissible in evidence under the provisions of the Indian Evidence Act, 1872. The medical officer categorically endorsed in the said post mortem report that the deceased sustained ante-mortem injuries, which have been reproduced in the earlier part of the judgment and that the death was due to haemorrhagic shock as a result of excessive bleeding from the ante-mortem injuries. At the time of the post mortem examination rigor-mortis was present in the corpse which indicate that the death probably occurred about a day ago. The post mortem was conducted at 1.10 P.M. on 30-8-1999 and

according to the prosecution the murder was committed at about 11 A.M. on 29-8-1999 and therefore the medical evidence amply corroborate the prosecution case about the time of the occurrence. There is no dispute that the murder was committed in the shop-cum-residential premises of the accused situate in ‘Kanda Parao’ and this was the reason that the accused also said in his statement under Section 313 of the Code of Criminal Procedure that the murder of his wife was committed in his absence with the object to seek his eviction form the said premises. In other words there can be not gain saying that it is established that the murder of Smt. Tulasi Devi was committed at about 11 A.M. on 29-8-1999 in accused’s shop-cum-residential premises in ‘Kanda Parao’, District Bageshwar.

13- The circumstances mentioned at serial Nos. 1 and 2 could be taken together since the evidence in this behalf is common. Defence did not dispute the case of the prosecution that accused and his wife Smt. Tulasi Devi deceased were living together in the accused’s shop-cum-residential premises in ‘Kanda Parao’ , the place of the occurrence. In this regard, there is also categorical statement of witness Ashok Kumar (P.W.3), a 15 years old real nephew of the accused. He gave out that his uncle, the accused and aunt Smt. Tulasi Devi were residing together in the said premises. As regards the circumstance that on the day of the occurrence also Smt. Tulasi Devi was seen alive with her husband, the accused in the said premises some time before the occurrence, it is also satisfactorily established by the evidence of this witness although he tried to help his uncle, the accused and had to be declared hostile by the prosecution. On being cross-examined by the D.G.C. (Criminal) on behalf of the prosecution, the witness Ashok Kumar gave out that his ‘Nanihal’ is situate in Dola Gaon and on the day when is aunt (Smt. Tulasi Devi deceased) died he went to his ‘Naniha’ from his village Bhital Gaon. He stated that on that day he went to Dola Gaon via village Kanda and on that day his uncle, the accused and aunt Smt. Tulasi Devi both were in Kanda. The statement so given by the witness was definite and categorical and on this account he became

conscious of it in the next breath again tried to help his uncle, by stating that on that day, he however, had not visited the house of his uncle. Learned counsel appearing on behalf of the accused submitted that the shaky evidence of this witness was not worthy of consideration and particularly when the witness was declared hostile by the prosecution. We see no merit in this argument because it is well settled that in appropriate cases the court can rely upon the part of the testimony of a hostile witness if that part of the deposition is found to be trustworthy. In the instant case although witness Ashok Kumar was declared hostile by the prosecution and was cross-examined on permission by the court it became evident that he merely tried to help his real uncle, the accused by resiling from his stand and statement given to the Investigating Officer but on being cross-examined gave evidence to the effect that on the day of the occurrence he went to the house of his uncle and found the accused with his aunt Smt. Tulasi Devi in the shop-cum-residential premises in Kanda and at that time Smt. Tulasi Devi was alive. The witness later on merely wanted to resile from this categorical statement which does not make any difference so for as his evidence in regard to the said incrimination circumstance is concerned. In other words the entire testimony was not unworthy of consideration and full reliance on his above part of evidence could safely be placed to draw a positive inference that on the day of the occurrence Smt. Tulasi Devi was alive in the company of her husband, the accused, in the said premises. Thus the presence of accused and his wife Smt. Tulasi Devi while she was alive before the actual occurrence of her murder in the said premises, stand established beyond doubt.

14- We will now consider the circumstance at serial Nos. 3 and 4 that the accused alone was present in the said premises which was locked form inside and where the dead body of Smt. Tulasi Devi was lying on the floor with injuries. The weapon of assault khukri, material Ext. 2 was attached from the said premises and the ante-mortem injuries of Smt. Tulasi Devi deceased were attributable to this weapon. In regard to these incriminating circumstances we have the evidence of two police witnesses

A.S.I. ram Kumar Sharma (P.W.5) and constable Keshav Dutt (P.W.6) both of whom were posted at Police Out Post Kanda, situate at a distance of about twenty meters from the place of the occurrence. At the out set it need to be stated that the learned counsel appearing on behalf of the accused persuasively argued that since n public witness has supported the prosecution case and public witness Mahendra Singh, who allegedly gave information at the police out post about the occurrence, was not produced in evidence, the interested testimony of these police witnesses could not be relied upon toward proof of these circumstances and that trial court fell in error in accepting the evidence of these witnesses as credible. In support of his argument learned counsel pressed in to service a decision of the Apex Court in the matter of Aslam Parwez versus Government of N.C.T. of Delhi; (2003) 9 Supreme Court Cases 141. In the case before the Apex Court on independent scrutiny the evidence of police witnesses was not found reliable and therefore it was found unsafe to place reliance upon the same evidence in order to convict the accused specially when the public and independent witnesses did not support the prosecution case on any material particular. In the reported decision it was not held that the evidence of police witnesses need to be rejected merely on account of their being the police witnesses but only if on proper scrutiny the evidence of such witnesses fail to repose confidence and their evidence do not appear credible. In other words the evidence of a police witness need to be placed on the same footing as the evidence of any other witness and the evidence of the police witness need to be relied upon only if found convincing on careful scrutiny and analysis. Therefore, the only requirement is to subject the evidence of both these police witnesses to strict scrutiny and cautious approach to find the credibility of their evidence which however can not be rejected merely on account of public witnesses of ancillary circumstances did not support the prosecution case and were declared hostile as referred in the earlier part of the judgment. For that reason non-production of

Mahendra Singh, who was not an eye witness of the incident shall also have no adverse effect on the prosecution claim.

15- Both P.W.5 and P.W.6 stated in one voice that when on being informed they reached the premises of the accused, its front as well as the rear doors were found latched from inside and that only a window of the rear portion of the premises was found open and from it the accused was seen present there inside the premises and was called upon to open the door. The accused did not oblige and tried to put the witnesses under threat of being harmed by a gun which he was then carrying with him. According to these witnesses the accused was coaxed successfully to open the door of the shop and since these witnesses went inside the dead body of Smt. Tulasi Devi deceased was found lying with injuries on the floor of the rear portion of the said premises. Accused was taken in to custody by these witnesses. Learned counsel on behalf of the accused submitted that the contradiction in the evidence of P.W.5 and P.W.6 assail the credibility of their evidence and their evidence should not have been relied upon to prove these incriminating circumstances and that the trial court, therefore, fell in error in accepting their evidence as reliable. The contradictions referred pertain to the articles which were possessed in hands by the accused when he opened the door of the premises and these witnesses went inside to find the accused there in the premises where the dead body of accused's wife with injuries was lying on floor. P.W.5, Ram Kumar Sharma gave out that accused was possessed of a gun in one hand and a khukri in the other hand and that these two articles exhibits 1 and 2 , were taken from the accused and were kept in the premises near the dead body of the deceased under the supervision and guard of constable Isham Singh and thereafter accused was taken under custody to Bageshwar to report the matter there at the police station, Kotwali. Contrary to this, P.W.6, constable Keshav Dutt gave out that when he entered inside the premises, the accused was found carrying gun (exhibit-1) in his band and whereas khukri (exhibit-2) was lying on the floor of the premises. Further according to P.W.5, the distance of police out post from the said place of occurrence is

twenty meters whereas according to P.W.6 the distance is about twenty paces. P.W.6 also stated that they entered in the premises of the accused from western side whereas as per site-plan, Ext. Ka.4, the said premises of the accused has had no door on the western side but only two doors, one in the north and another in the south and the said premises being bounded in the east and west by shops of other persons. The contradictions referred above in the evidence of these two witnesses and the infirmity pointed out in the evidence of P.W.6, can not at all be said to be substantial as may have the effect of discrediting the testimony of these witnesses or any of them. Both the witnesses were cross-examined at length and it is evident that they have supported the prosecution case in material particulars, that is, the accused was inside the premises, the place of the occurrence which was found locked from inside; that on being coaxed the accused opened the door; that the accused was fond inside the premises where the dead body of his wife Smt. Tulasi Devi was lying on the floor with injuries; that accused was carrying a gun in his hand and that khukri (exhibit-2) was also attached from there when the accused was taken in to custody. It does not make any difference that the khukri was in the hand of the accused or it was lying near the dead body of the deceased and the minor contradiction in the evidence of the witnesses in that regard would not entail rejection of their otherwise reliable evidence. Even if the evidence of P.W.5 has an element of embellishment in the sense that according to him the accused was possessed of the khukri in his another hand at that time it would not indicate that his evidence was totally unreliable and substantially contradicting the evidence of P.W.6 Further there can not be much difference if P.W.5 says that the distance between the place of the occurrence and the police out post was twenty meters and other witnesses P.W.6 claimed that the distance was only about twenty paces and this instance can not be taken to assail their credibility. In regard to the infirmity about the doors of the said premises, the same in the evidence of P.W.6 can safely be attributed to the absence of proper sense of directions and at any rate this could not be said to be fatal to the otherwise

reliable evidence of the witness in regard to the essential particulars of the case.

16- As is evident from the medical evidence the deceased sustained good number of incised wounds on her person and she died due to haemorrhgic shock as a result of excess bleeding. Khukri, material exhibit-2 in a sharp cutting weapon and there can be no doubt that incised wounds and incised cut injuries could be caused by this weapon. The evidence of P.W.5 and P.W.6 conclusively prove that khukri was there inside the premises of the accused and it was therefore attached by the Investigating Officer vide memo, Ext. Ka.1 proved by P.W.7, S.I. Roop Ram Sagar, who also accompanied the Investigating Officer, Shailendra Bhardwaj and assisted in the steps taken in the investigation including holding of the inquest on the dead body of the deceased. His evidence and that of P.W.5 and P.W.6 is to the effect that the khukri was blood stained and the same was also sent to serologist for his expert report along with samples of blood stained and plain pieces of floor wood and clothes of the deceased. The report of expert dated 31.12.1999, paper No. 6-A was tendered on record by the prosecution. Learned counsel for the accused submitted that the public witness Sundar Singh (P.W.1) did not support the prosecution case about the attachment of the khukri from the place of the occurrence and was declared hostile by the prosecution and therefore the evidence of the police witnesses was not sufficient to prove that it was seized from the premises of the accused where the dead body of the deceased was found lying with injuries. Although this public witness was declared hostile but in cross-examination on behalf of the prosecution he admitted his signatures on the memo, Ext. Ka.1 which indicate that he merely tried to help the accused by resiling from his earlier stand, but the same can still be taken to support the evidence of police witnesses in that regard. Therefore, there is not merit in the argument of the learned counsel and it can safely be accepted that the blood stained khukri was attached from the place of the occurrence where the dead body of the deceased was found lying and where

the accused alone was present in locked premises and was then taken in to custody.

17- An attempt was also made to discredit the prosecution evidence in that regard by referring to some discrepancy about the actual measurement of khukri, ext-2 and the measurement as given in the memo of attachment, Ext. Ka.1 and also the evidence of S.I. Roop Ram Sagar (P.W.7). The full length of the khukri including its blade and handle was measured as about two ‘ballists’ by P.W.7 in the court. In Ext. Ka.1, the measurement of khukri was mentioned as about two ‘ballists’ four ‘anguls’ and separate length of handle was mentioned as six ‘anguls’. No doubt there is some difference about the measurement but it is of significance that in the memo,Ext.Ka1 the approximate length of khukri was mentioned as two ‘ballists’ four ‘anguls’ which by its description in the memo do not exclude the handle of the khukri and since the measurement was given by mere approximation some difference after actual measurement in court of the article came to be exposed which at any rate can not be said to be as substantial as may entail rejection of otherwise reliable evidence of the witnesses about the seizure of the khukri from the premises where the dead body of deceased was found lying with injuries and where the accused alone was present and was taken in to custody. In short the argument of the learned counsel failed to make any dent in this part of the prosecution version and we feel no hesitation in saying that the trial court was justified in coming to the conclusion that he khukri, exhivit-2 was so attached by the investigating officer from the said premises and that it was blood stained at that time.

18- in regard to the report of the Serologist, learned counsel for the accused submitted that on chemical analysis although the khukri was found to be stained with human blood as was the case of the other articles but the group of the blood on it was not classified as tallying with the group of the deceased Smt. Tulasi Devi and that on this account the khukri should not have been held to be the weapon of assault wielded in causing the fatal injuries to the victim. In support of the argument learned counsel placed

reliance on a decision of the Apex Court in the matter of Raghunath versus State of Haryana and another; (2003) 1 Supreme Court Cases 398. In the case before the Apex Court blood-stained earth, Muffler and Lathis said to have been taken in possession by the police in the course of the investigation were found to have human blood but the report of the forensic lab did not confirm that the human blood belong to a particular group which is the same blood group of the deceased of that case and in the peculiar aspects of that case this factor was also taken to assail the prosecution version. The facts of the reported case were, however, at variance because in the instant case the seizure pertain to weapon of assault which was found stained with human blood although the group of the blood could not be classified by analysis. The presence of the blood-stains on the khukri (exhibit-2) required consideration in the peculiar aspects of the case that the said article was found lying near the dead body of the deceased itself at the place of the occurrence and there was no point in planting such recovery or attachment when the accused alone was found present there in the premises with the dead body and was then arrested from there. In these circumstances absence of determination of blood group of stains on the khukri does not make the find of human blood of no consequence and in the face of the facts of the case there can be no gain saying that the above reported decision would not support the argument advanced on behalf of the accused. In other words the ante mortem injuries sustained by Smt. Tulasi Devi deceased can safely be said to be attributable to khukri, material exhibit-2 attached from the place of the occurrence. It was also submitted by the learned counsel for the accused that the evidence of constable Bahadur Singh (P.W.9) indicate that the packet of the articles intended to be sent to forensic lab were retained by him for considerable period from 9-10-1999 to 11-10-1999, the date of the delivery of the sealed packet of the articles at the lab at Agra and that the said long duration do not rule out the possibility of tampering with the seals of the packet of the articles intended to be examined by the expert and that this aspect of the matter also tell upon the relevance and

evidentiary value of the expert's of the case. We see no merit in this argument also because this witness gave categorical statement that during the period when the packet remained in his custody for delivery at the government lab, the seals of the packet were not tampered with and remained intact. There is nothing in his cross-examination which may suggest that the witness may have permitted tampering of the seals effecting the veracity of the expert's opinion about the presence of human blood-stains on khukri, exhibit-2 as well as other articles.

19- For the reasons aforesaid and the evidence on record we find ourselves in agreement with the conclusion drawn by the trial court that the khukri when seized from the place of the occurrence was blood-stained and the incised injuries of Smt. Tulasi Devi deceased were attributable to this weapon and also that the accused alone was present in the said premises with the dead body of the deceased and the doors of the said premises were locked form inside and that the accused was taken in to custody from there. In short both these circumstances also stand established against the accused.

20- The two other circumstances at serial Nos. 5 and 6 above, viz., the multiple incised injuries sustained by Smt. Tulasi Devi were possible only when she was kept confined in the said premises unprotected and particularly in the rear portion of the said premises so that nobody can easily notice the screaming sound of the victim when assaulted by khukri wielding assailant present there in the said premises. As referred above the evidence of P.W.5 and P.W.6 proved beyond doubt that accused alone was found present in the premises where the dead body of Smt. Tulasi Devi was found lying with injuries and khukri, the weapon of the assault was also seized from there. The dead body was lying in the rear portion of the premises as shown by encircled cross in site plan, Ext. Ka.4 and the door of the premises being locked from inside facilitated its other occupant to fatally assault the victim whose screaming sound could not be noticed by outsiders on account of the assault being made in the rear/back portion of the premises and in the south of which was only a vacant plot of

land. The rear portion of the premises was designedly chosen to successfully assault the victim by the only other occupant, the accused and therefore, the place of the occurrence and the manner of the assault as indicated by the multiple injuries of the sharp edged weapon, khukri, unerringly point to the culpability of the accused who alone was there inside that premises and was capable of fatally assaulting his wife the victim of the case. Thus the evidence in the case also establish that murderous assault on Smt. Tulasi Devi was possible in the rear portion of the said premises when she was kept confined in the locked premises and that too unprotected from the assault by the only other occupant of the premises at that time and due to selection of the rear portion of the said premises nobody was able to notice or hear any screaming sound of the victim.

21- The last circumstance mentioned at serial No. 7, viz., the false explanation given by the accused that at the relevant time he was not present in the said premises as he was away from there in order to saw off his niece and was arrested from the bus station by the police. The evidence of P.W. 5 and P.W.6 has been referred in detail with reference to incriminating circumstances mentioned at serial Nos. 1 and 2 and it had been held that apart from Smt. Tulasi Devi deceased accused alone was present in the said premises at the relevant time of the incident and the locked doors of the premises were opened by the accused himself who was arrested then and there from the said premises where the dead body of Smt. Tulasi Devi was lying on the floor with injuries. The evidence of the prosecution thus rebutted the defence stand and proved that accused gave false explanation that he was not there in said premises at the probable time of the fataol assault on the victim. It is also of significance that accused's nephew Ashok Kumar (P.W.3) gave out that on the day of the occurrence accused and Smt. Tulasi Devi deceased both were together in Kanda, the village of the occurrence and we don't think that there is any grain of truth in the claim made by the accused that he was away from the said premises at the relevant time in connection with sending his niece, the daughter of his elder brother to some

other place and was arrested from the bus station. We see no merit in the argument of the learned counsel that the stand taken by the accused was supported by the fact that no credible evidence was adduced by the prosecution to the effect that the accused got to be admitted in hospital at Bageshwar by P.W.5 and P.W.6 when the accused on way to Bageshwar from the village of the occurrence started vomiting. The reason being that the defence did not dispute that the accused was taken to hospital by P.W.5 and P.W.6 and this was the reason that P.W.5, Ram Kumar Sharma was specifically suggested that the accused was arrested while the accused was on way to his village Kanda from Bhital Gaon and when the accused raised objection to his arrest, he was taken to the hospital by falsely showing that the accused had started vomiting. The suggested was denied by the witness but at any rate the stand taken by the defence in the cross-examination was that the accused was in fact taken to the hospital but according to the defence the accused was taken on the hospital on a false pretext of developing nausea. In view of these aspects of the case it is evident that the accused gave false explanation that he was not there in the said premises at the time of the incident although he was the only person being present alone in the said premises with his wife Smt. Tulasi Devi deceased to have explained incriminating circumstance appearing against him. This aspect of the matter also indicate that the accused instead of giving an explanation as to how his wife was done to death in his residential premises occupied by him and his wife, put forward a false explanation referred above. In the peculiar circumstances of the case Section 106 of the Evidence Act has application which oblige the accused to offer an explanation as to how his wife was done to death by virtue of his special knowledge and also being in the said premises with his wife and his failure to give any explanation led the court to draw an adverse inference which is also a piece of circumstantial evidence against the accused. Learned counsel for the accused, however submitted that Section 106 of the Evidence Act has no application to the facts of the case because the provision do not envisage that the burden of proving a plea set up

by the accused lies upon him and particularly when according to him there was no credible evidence from the side of the prosecution. In support of the argument learned counsel placed reliance on a decision of the Apex Court in the matter of Sawal Dass versus State of Bihar; A.I.R. 1974, Supreme Court, 778. In the reported case it was laid down that the onus to explain certain circumstance lies on the accused only when the prosecution has led evidence which if believed, will sustain conviction, or makes out a prima facie case against the accused. We are convinced that the principle laid down in the reported decision do not support the cause of the accused rather the stand of the prosecution because its evidence satisfactorily establish that the occurrence took place inside the residential premises of the accused where he alone was present at the probable time of the incident with his wife Smt. Tulasi Devi who was found murdered therein the said premises and the accused was as such seen present there in the locked premises by the witnesses examined in the case. It was highly improbable that some one else committed the murder to facilitate eviction of the accused from the tenanted shop-cum-residential premises. In a situation like this, we have no hesitation in agreeing with the conclusion that the false explanation given by the accused and failure to offer an explanation as to how the murder of his wife was committed is a piece of circumstantial evidence against him.

22- As regards the investigation of the case, it is true that the clothes of the accused according to P.W.5 were blood stained and these were not attached to be sent to the Serologist for his report. Likewise as pointed out by the learned counsel for the accused finger prints from the handle of khukri, ext.2, were not traced during investigation. In our view benefit of the act of omission of the investigating agency would not go to the accused in the interest of justice. The Apex Court in Leela Ram (Accused) through Duli Chand vs. State of Haryana and another; A.I.R. 1999 SC 317 laid stress on the legal proposition that any irregularity or even an illegality during investigation should not be taken as a ground to reject the prosecution case. So far as the motive aspect

is concerned, it is well settled that if the circumstances relied upon by the prosecution are proved beyond doubt, then the absence of motive would not hamper a conviction [see (2002) 7 S.C.C. 157, Mani Kumar Thapa vs. State of Sikkim].

23- Upon an independent evaluation of the evidence adduced in the case we find ourselves in entire agreement with the view taken by the trial court that the above incriminating circumstances stand clearly established and these circumstances form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In other words we are satisfied that the trial court has committed no error in convicting the accused for the offence punishable under Section 302 I.P.C.

24- In regard to the offences under Section 4/25 and 25 Arms Act, we find that the trial court committed an error in holding that these offences were also legally established against the accused. The reason being that the prosecution had not adduced any evidence to establish that there was any notification by the government prohibiting possession of the sharp edged weapon such as khukri having the same measurement as was of the khukri attached from the accused in this case and further the prosecution has not adduced any evidence to prove that sanction under Section 39 of Arms Act to prosecute the accused for an offence under Section 25 of the Arms Act was accorded by the District Magistrate, Bageshwar. Therefore, in the absence of the evidence of these facts the accused could not have been held liable for commission of offences under Section 4/25 and Section 25of the Arms Act. Therefore, the conviction and sentence awarded to the accused under these counts can not legally be upheld and the accused deserve to be acquitted of the charges under Section 4/25 and Section 25 of the Arms Act.

25- In the aforesaid premise this appeal partly succeed and is to be allowed accordingly.

26- The appeal is partly allowed. The accused Bahadur Ram is held not guilty and acquitted of the charges under Section 4/25 and Section 25 of the Arms Act. His conviction and sentence

under these counts recorded per judgment dated 12.12.2001 is set aside.

27- The conviction and sentence awarded under Section 302 I.P.C. Per said judgment against the accused Bahadur Ram is however upheld. He therefore shall undergo imprisonment for life and shall pay a fine of Rs. 5000/- as awarded by the trial court. In default of payment of fine he shall further undergo R.I. for six months. He is in jail and Shall suffer the sentence awarded against him.

28- Let the record be sent to trial court.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

ISB